

PUBLIC LAW BOARD NO. 7529

Brotherhood of Maintenance of Way)	
Employes Division - IBT Rail)	
Conference)	
)	
and)	Case No. 71
)	Award No. 71
)	
CSX Transportation, Inc.)	

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's imposition of a forty-five (45) day calendar suspension upon Claimant R. Eads for the alleged violation of CSXT Operating Rules 100.1, 104.2, 104.3 and the CSXT Violence in the Workplace Policy was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (Carrier's File 2014-173623).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Eads shall receive the remedy prescribed in Rule 25, Section 4 of the Agreement."

Background

On May 8, 2014, Claimant removed the lock and tag from track switch #4 at the east end of the transfer yard. The lock had been installed by Track Inspector Fowler. Claimant, also a Track Inspector, inspected the track prior to unlocking it and determined the track was suitable for a work train crew under his direction and control notwithstanding the lock out by Fowler. After the work train crew completed its use of the track and prior to Claimant returning to lock that track from general service, Fowler returned, placed the lock on the track and wrote on the tag "what is it about out of service that you don't understand?" When Claimant returned, observed the track was locked and read Fowler's comment on the tag, he responded "up yours commie pig" and "anytime, anywhere." When Fowler read Fowler's response, he contacted the ethics hot line.

On May 30, 2014, Claimant and Fowler were working at their computers located on the same table but opposite each other. Claimant slipped a piece of paper to Fowler that stated "hurt feelings report" and told Fowler he may want to keep this slip of paper in his documents. A heated exchange ensued with Claimant standing up and leaning towards Fowler stating "that's right I do know a lot about derailments" and "anytime, anywhere" and Fowler responded "fuck you" and left the work table.

On June 10, 2014, the Carrier issued a notice of investigation to Claimant stating:

The purpose of this formal investigation is to determine the facts and place your responsibility, if any, in connection with information received on June 1, 2014 that two incidents occurred. First, you failed to remain civil and courtesy towards a teammate on May 8 and on May 30, 2014 you exhibited threatening behavior towards a co-worker.

In connection with the above incident, you are charged with failure to properly perform the responsibilities of your position, and possible violations of, but not limited to, CSXT Operating Rules – 100.1, 104.2, and 104.3; and CSX Violence in the Workplace Policy.

Rule 100.1 requires employees to know and comply with rules, instructions and procedures governing their duties and to take the safest course but should there be a need for clarification on that course to contact a supervisor. Rule 104.2 requires employees not to quarrel and Rule 104.3 prohibits employees from engaging in altercations or boisterous, profane language. The policy on workplace violence requires a secure work environment, free from intimidation, acts of violence or threats of violence.

On June 19, 2014, an investigative hearing convened wherein Claimant and his representative cross-examined Carrier witnesses and presented testimony and evidence.

On July 9, 2014, the Roadmaster notified Claimant as follows:

Based on the evidence and testimony presented by witnesses, as well as yourself during the course of hearing, sufficient proof exists to demonstrate you are guilty of violating CSXT Operating Rules – 100.1, 104.2, and 104.3; and CSX Violence in the Workplace Policy.

Upon my analysis of all the factors related herein, and based upon my finding of guilt, it is my decision that the discipline to be assessed for these proven offenses is a forty-five (45) calendar day actual suspension[.]

On July 25, 2014, Claimant elected to proceed with a review of the imposed discipline by submitting a claim to this Special Board of Adjustment No. 7529. In doing so, Claimant acknowledged that the decision of the Neutral Member of the Board is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement.

Carrier's Position

Claimant was afforded a fair and impartial hearing. Any assertion by the Organization that the Carrier had knowledge of the first incident (May 8) but did not act in a timely manner under Rule 25(d) is new argument.

The Carrier met its burden of proof on the charged violations. Claimant wrote on the lock out tag that Fowler was a "commie pig" and "anytime, anyplace." Claimant acknowledged he slid a piece of paper to Fowler on May 30, 2014, in an effort to upset or rile him because Fowler had acted in that manner to Claimant earlier that day. Claimant acknowledges using inappropriate language and did so at the hearing where he labeled Fowler a "low belly crawler." Claimant's overt hostility to Fowler as well as Claimant's decision to return to service the tracks that Fowler had removed from service shows that Claimant's comment that he "knows a lot about derailments" was a threat to Fowler. In March 2014 Claimant received discipline for improper track inspection resulting in a derailment. Discipline imposed is appropriate for these serious violations; Claimant's discipline should remain undisturbed. In support of its position, the Carrier relies on Third Division Award 29817 and Award 28 of Public Law Board 7120.

Organization's Position

Rule 25(d) requires the Carrier to issue a charge within 30 days of the date it has knowledge of the bad act. Fowler notified the ethics hotline and the Assistant Roadmaster on May 8 about that incident; however, the Carrier did not charge Claimant until June 10 which exceeds the 30-day window. At no time during the hearing did the Carrier assert it became aware of the May 8 incident at a later date.

There is insufficient evidence to support the charge that Claimant was discourteous, uncivil or engaged in threatening behavior towards Fowler. Although Claimant and Fowler personally dislike each other, a reasonable person would not conclude Claimant violated any rules. Claimant testified that he walked and inspected track #4 and determined it was usable for the work train crew (Y130) under his direction and control. Claimant unlocked the track to allow movement of Y130. Prior to Claimant returning to the track to install a lock out to preclude general use of the track, Fowler locked the track wrote on the tag "What about out of service don't you understand?" When Claimant arrived, he read the tag and responded to the discourteous comment with, in his words, a discourteous comment "up yours commie pig" and "anytime, anywhere."

Claimant testified that the first time he worked with Fowler several years past they discussed politics; they are at opposite ends of the political spectrum and their work relationship has been in downward spiral since then. When considering their work relationship, Claimant's statement that "I do know a lot about derailments" was not a threat but a response to Fowler questioning Claimant's abilities as a track inspector and his experience with derailments.

The discipline is arbitrary and unwarranted given Claimant's 40-years of service and positive work history. In this regard, witnesses praised Claimant's work and confirmed he has not made threats in the past. Claimant responded in a like manner to Fowler's inappropriate language. Fowler uttered goading comments that created and sustained this rocky relationship in the workplace. Since Fowler engaged in the same conduct as Claimant but was not investigated by the Carrier or subjected to discipline, the Claimant has been subjected to disparate treatment. In this context Claimant's 45-day suspension is punitive and should be diminished if not set aside entirely.

Findings

Public Law Board No. 7529, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

A decision by this Special Board of Adjustment No. 7529 is based on the notice of investigative hearing, transcript of hearing, notice of discipline, Claimant's prior service record and Rule 25 of the Agreement. Within that evidentiary framework, the Board renders these findings.

Regarding the BMW's assertion that the Carrier did not charge Claimant with a rules violation within thirty (30) days of the incident as required by Rule 25(d), this process-defect assertion is assessed within the context of the hearing where the Organization's two (2) representatives did not present testimonial evidence about Rule 25(d) or otherwise articulate the issue. On that basis, the Board finds the Organization's assertion to be unproven.

Furthermore, the Board finds there is substantial evidence that Claimant, on May 8, wrote “up yours commie pig” and “anytime, anywhere” on a tag placed on a switch previously locked by Fowler. Claimant wrote those comments in response to a comment written by Fowler “what part about out of service don’t you understand?” or, as Claimant interpreted it, “which part about out of service don’t you understand you big dumb ass?”

The Board finds there is substantial evidence that Claimant, on May 30, slid a piece of paper across the table to Fowler which stated “hurt feelings report” and, during the ensuing heated exchange between them, stated “anytime, anywhere.” Fowler responded “I’m sorry man, that’s it, fuck off” and, in response to Claimant’s comment “anytime, anywhere, “I [Fowler] told him again to fuck off” and “he’s already had almost 15 derailments in his territory” whereupon Claimant responded “I do know a lot about derailments.”

The Board finds that Claimant’s statements and conduct violate Rules 104.2 and 104.3 dealing with civility and courtesy towards co-workers and that he engaged in quarrelsome responses and used profane and vulgar language. Violating Rules 104.2 and 104.3 results in a derivative violation of Rule 100.1 (comply with the rules). The Board finds insufficient evidence that Claimant violated Rule 100.1 on the basis that he improperly unlocked track switch #4 in view of Claimant’s testimony on this item.

As for whether Claimant’s statement “I do know a lot about derailments” and “anytime, anywhere” are threatening, they are considered within the context of Third Division Award 29817 where threatening remarks are found to “cover a broad spectrum of conduct” and, as in that case, the Board finds Claimant’s statements “fall within the more benign side of this spectrum.” As in Award 58 of PLB 7120, Claimant does not have a history of making threatening remarks according to testimony from supervisors. There is, moreover, insufficient evidence that Claimant threatened Fowler. Claimant denies threatening Fowler and Assistant Engineer Whitaker (AE) testified that Fowler stated to the AE he [Fowler] was not threatened by Claimant but he (Fowler) believed Claimant was threatening to sabotage CSX with his statement about derailments. There is no evidence that Claimant threatened acts of sabotage against CSX. From a reasonable person standard, Claimant did engage in an act of intimidation towards Fowler when he leaned across the table thereby eliminating the work and personal safe space between them. Fowler left the table at that point but not before telling Claimant to “fuck off.” Intimidation is contrary to the policy on workplace violence.

Claimant’s rules violation is his second offense within the past three months (failure to properly reinspect track resulting in a minor derailment). Progressive discipline is warranted; however, the 45-day suspension is excessive and, therefore, punitive. In this regard, Claimant’s un rebutted testimony is that Fowler taunts him at work by sticking out his chin and telling Claimant to hit him, refers to Claimant as “day one” despite Claimant having forty (40) years of service and tells Claimant to “fuck off” on numerous occasions. Claimant acknowledges his wrongdoing in this proceeding; Fowler is not with clean hands. Coupled with Claimant’s self-acknowledgment as to his culpability is testimony from those witnesses supervising and directing Claimant over the course of years that he is reputable employee and serious about performing his duties in a timely and thorough manner. In view of these findings, the 45-day calendar suspension is reduced to a five (5) day suspension along with restoration of seniority and other benefits.

Award

Claim sustained in accordance with the findings.

Patrick J. Halter /s/

Patrick J. Halter
Neutral Member

Dated on this 4th day of
December, 2015